In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 596

HENRY BRULAY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of California, petitioner was convicted of conspiring to smuggle amphetamine tablets from Mexico into the United States, in violation of 18 U.S.C. 371 and 545 (1 R. 2–3, 66; see Pet. App. 24–25).[1] He was sentenced to five years' imprisonment, with parole eligibility to be determined by the Board of Parole pursuant to 18 U.S.C. 4208 (a)(2) (1 R. 36). The court of appeals affirmed (Pet. App. 13–20).

[1] Named as unindicted co-conspirators were Henry-Brulay, Jr., David Fierro, and "other persons to the Grand Jury unknown * * *" (1 R. 1; Pet. App. 24).

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Petitioner contends that the fruits of an unreasonable search and seizure carried out by Mexican police in Tijuana, Mexico, were improperly admitted at trial in violation of his Fourth Amendment rights, and that statements he made to Mexican and United States authorities around the time of his arrest in Mexico were admitted into evidence in violation of his Fifth Amendment privilege against self-incrimination.

1. The pertinent evidence relating to these contentions, adduced at the hearing on petitioner's motion to suppress the amphetamine tablets, and at the trial, show that at about 8:30 or 9:00 a.m. on January 28, 1966, two officers of the Tijuana, Mexico, Police Department stopped an automobile being driven by petitioner because it had been going "quite fast" and appeared to be heavily loaded in the rear (2 R. 11–13, 17, 36–37, 51–54, 56–57, 58). These officers were assigned to investigate auto thefts and were authorized under Mexican law to stop anyone who looked suspicious (2 R. 14, 17, 58–59). When asked by the officers what he had in the trunk, petitioner, who appeared to be "quite nervous", replied that it contained some packages. The officers became suspicious and took petitioner and the automobile to local police headquarters to determine the contents of the trunk (2 R. 17, 37, 51–59). The officers were not acting on any information previously provided by United States authorities (2 R. 14–17, 59).[2]

[2] Petitioner had, in fact, been under investigation for smuggling by United States Customs authorities since December 21, 1965. On January 24, 1966, the federal Mexican police authorities (not the Tijuana police) were advised of certain information that such investigation had turned up (2 R. 26–28).

Shortly after their arrival at the Tijuana police station (between 9 to 9:30 a.m.) (2 R. 2, 3, 61), at the direction of the local authorities, petitioner opened the car trunk, where some 297 pounds of boxed amphetamine tablets were found (2 R. 13–14, 15, 21–22, 37–38). Apparently that same day (but compare 2 R. 22–23 with 2 R. 39–40), petitioner was taken to a room at police headquarters and questioned about these tablets (2 R. 24). He was questioned on various occasions during the remainder of the day (2 R. 61–64, 71–76). The room in which the questioning took place was "sort of a living room. It has a long sofa and a small sofa and a writing desk" (2 R. 75). Some time during the day, petitioner advised the officers that he was "involved in that business of the tablets" (2 R. 40), and that since there had been no shipment for the previous four weeks he had come to Mexico to discuss the matter with one of his associates (2 R. 23, 40–42, 76).[3] At about 10 or 11 p.m. that same night, petitioner took the Tijuana police to a house in that city, obtained a key to a room therein from an occupant of the premises and entered with the officers. In the room there were an additional 1,980 pounds of tablets worth "at least some 200 thousand dollars" in the American market (2 R. 22, 41–44, 62, 75–76). Petitioner was then returned to the interrogation room, where he presumably remained overnight.

In the mid-morning of either January 29 or January 30 (see 2 R. 47–50, 103–104), United States Cus-

[3] It is not a crime in Mexico to possess or transfer amphetamine tablets (2 R. 34).

toms agent Moore arrived in Tijuana and interviewed petitioner in a "good-sized room" at the Tijuana jail (2 R. 112, 114). Before the interview, the agent identified himself as a United States Customs officer and advised petitioner that he was not required to make any statement; that any statement he might make could be used against him; and that he was entitled to be represented by counsel (2 R. 102–104, 107–108). Petitioner made certain incriminating admissions to the agent (2 R. 108). Agent Moore had a second interview with petitioner at the Tijuana jail on February 2, 1966; the agent also began this interview with a warning such as he had earlier given to petitioner (2 R. 108–109).[4] At this time, petitioner indicated that he had previously cooperated with the Tijuana police (2 R. 110–111). At a February 3 interview with another Customs agent (at which petitioner was also warned of his rights), he again stated that he had "cooperated" fully with the Mexican police (see 2 R. 96–99, 101). Petitioner did not offer any testimony or request a hearing on the voluntariness of his admissions outside the presence of the jury.

The trial court denied the motion to suppress the seized amphetamine tablets, noting that "[n]o federal law applies in Mexico" (2 R. 30; see *id.* at 29–31). As to the admissions, the trial court pointed out, *inter alia,* that defense counsel did not "elect to ask to hold any hearing out of the presence of the jury,

[4] Agent Moore interviewed petitioner a third time on February 5, 1966, while he was in jail in San Diego. Petitioner was again warned of his rights (2 R. 102–103), and made some additional incriminating admissions (2 R. 106–107).

outside of some Bench conferences. No requests of any sort were made except that he made objections at the Bench" (2 R. 204). The trial court, in accord with the principles of *Jackson* v. *Denno*, 378 U.S. 368, thereupon made specific findings that the admissions made by petitioner to the Mexican and American authorities were free and voluntary (2 R. 204–205). He thereafter instructed the jury that it had to disregard "entirely" any confessions if "the evidence does not convince beyond all reasonable doubt" that they were made voluntarily (3 R. 304–306; see also the court's earlier admonition in this regard during trial (2 R. 105–106)).

2. Both courts below correctly held that the admissibility of the amphetamine tablets seized in Mexico by Mexican authorities was not to be tested under Fourth Amendment requirements. There is nothing in this record to suggest that the Tijuana police were acting at the behest or instigation of American authorities. On the contrary, the testimony shows that, at the time of the seizures, the Tijuana authorities had no knowledge that petitioner was under investigation by United States Customs officials. This then was a search conducted in a foreign land under the control and direction of foreign law-enforcement officials who were not bound by Fourth Amendment requirements. The purpose of the constitutional rule of exclusion—to effectuate the constitutional right "by removing the incentive to disregard it"[5]—is not served by the exclusion of evidence seized outside the United States

[5] *Elkins* v. *United States*, 364 U.S. 206, 217; *Mapp* v. *Ohio*, 367 U.S. 643, 656, 657.

by foreign law-enforcement officials. *Birdsell* v. *United States*, 346 F. 2d 775 (C.A. 5), certiorari denied, 382 U.S. 963; cf. *Burdeau* v. *McDowell*, 256 U.S. 465; see Pet. App. 14.

3. We agree with the court of appeals (Pet. App. 15–16) that the admissibility of petitioner's admissions cannot be justified by reliance on a similar line of analysis. Illegally obtained confessions are not excluded merely as a salutary measure to deter illegal law enforcement. They are excluded because of a "complex of values", including both the likelihood that if involuntary they are untrustworthy and the general distaste for a man's convicting himself out of his own mouth—the result if involuntary confessions are used as an aid in establishing guilt. See, *e.g.*, *Blackburn* v. *Alabama*, 361 U.S. 199, 206–207; *Jackson* v. *Denno*, 378 U.S. 368, 385–386. Accordingly, basic concepts of voluntariness and fairness, in our view, govern the admissibility of the admissions made by petitioner to the Mexican as well as to American authorities. Compare *Bram* v. *United States*, 168 U.S. 532.

These standards, we submit, were satisfied as to each of the confessions here in issue. Both courts below could—as they did—conclude that the admissions obtained by the Mexican authorities were not the product of physical or mental coercion; that, on the contrary, petitioner of his own free will had cooperated fully with the Mexican authorities and made voluntary and uncoerced concessions of guilt to them. On the instant record, there is no basis for an argument that petitioner's confessions to the Mexican and American

agents were the product of the duration or nature of his detention. The questioning by the Mexican police was not continuous, but was conducted intermittently by one police officer (See R. 61–63, 75–76). Nor was the room in which petitioner was kept during this time barren or uncomfortable. There is, in short, no indication in this case of the inherently coercive process of extensive relay questioning which could be deemed to have vitiated the voluntariness of petitioner's admissions. See, *e.g., Reck* v. *Pate,* 367 U.S. 433, 435–443; *Haynes* v. *Washington,* 373 U.S. 503, 513–515. Petitioner's questioning by American authorities was of course preceded, on each occasion, by a warning as to his rights (see *supra,* p. 4). In any event, petitioner never requested a hearing outside of the presence of the jury to testify or to present any evidence concerning the circumstances surrounding his interrogation. Accordingly, such gaps in the record as may exist regarding the specific details and the exact length of petitioner's detention and questioning should not be regarded as sufficient to undermine the holdings below on the voluntariness issue. Compare *Jones* v. *United States,* 357 U.S. 493, 499–500.[6]

[6] Since petitioner's trial commenced on March 22, 1966, the particularized warning requirements of *Miranda* v. *Arizona*, 384 U.S. 436, decided on June 13, 1966, have no application here. *Johnson* v. *New Jersey*, 384 U.S. 719. Nor is the rule of *Escobedo* v. *Illinois*, 378 U.S. 478, pertinent in this case, since petitioner never requested and, accordingly, was not denied, any right to confer with counsel. See *Johnson* v. *New Jersey*, 384 U.S. at 734. There is thus no need to consider whether these requirements would apply to questioning by the Mexican police (see Pet. App. 15).

The district court, the jury and the court of appeals found the confessions to have been made voluntarily. In the instant circumstances, then, there is no further occasion for review by this Court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER 1967.

U.S. GOVERNMENT PRINTING OFFICE: 1967